Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-801

CONSUMERS UNION OF UNITED STATES, INC. and EDWARD J. GORIN,

Appellants,

against

MURIEL SIEBERT, Superintendent of Banks of the State of New York,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Appellee
Two World Trade Center
New York, New York 10047
(212) 488-7400

SHIRLEY ADELSON SIEGEL
Solicitor General

JUDITH A. GORDON
Assistant Attorney General
of Counsel

Questions Presented

1. Is an individual's interest in purchasing savings bank life insurance protected by the Privileges and Immunities Clause, Article IV, § 2, of the United States Constitution?

2. If so, may New York's limitation on the sale of savings bank life insurance to residents and individuals working regularly in state be upheld as reasonably related to the state interests reflected in the enactment of a savings bank life insurance program and as non-discriminatory with respect to any excluded nonresident?

TABLE OF CONTENTS

PAGE

Questions Presented i

Statement of the Case 3

A. Savings Bank Life Insurance in New York .. 3

B. The Questions Properly before this Court and the Opinions Below 10

ARGUMENT—Prior Decisions Of This Court Foreclose Consideration Of Appellants' Claim Against New York Banking Law § 268 Under the Interstate Privileges And Immunities Clause Or Make It Manifest That The Claim Does Not Warrant Plenary Consideration 14

A. An individual's interest in purchasing New York SBLI is not protected by the interstate Privileges and Immunities Clause 14

B. Banking Law § 268 is reasonably related to substantial state interests reflected by the savings bank life insurance program and does not discriminate against any excluded non-resident 19

C. Banking Law § 268 is not subject to scrutiny under the Commerce Clause 21

D. Banking Law § 268 does not violate the Commerce Clause 22

Conclusion 23

PAGE

CASES

Baldwin v. *Montana Fish & Game Commission*, 436 U.S. 371 (1978) 10, 12, 14, 16

California Automobile Association v. *Maloney*, 341 U.S. 105 (1951) 18

Consumers Union of the United States, Inc. v. *Albright*, 427 F. Supp. 840 (S.D.N.Y. 1977), vacated and remanded *sub nom. Consumers Union of United States, Inc.* v. *Heimann*, 438 U.S. 901 (1978) 2, 3, 10, 11, 12

Hicklin v. *Orbeck*, 437 U.S. 518 (1978) ... 2, 3, 10, 12, 15, 19

Hughes v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976) 13, 18

Hughes v. *Oklahoma*, 426 U.S. 794 (1976) 13

Lewis v. *BT Investment Managers, Inc.*, —— U.S. ——, 100 S. Ct. 2009 (1980) 21

Osborn v. *Ozlin*, 310 U.S. 53 (1940) 17, 18

Paul v. *Virginia*, 8 Wall. 168 (1968) 14, 16, 20, 21

Prudential Insurance Co. v. *Benjamin*, 328 U.S. 408 (1946) 21

Reeves v. *Stake*, —— U.S. ——, 100 S. Ct. 2271 (1980) 13, 14, 16, 18, 22

Rubin v. *Glaser*, —— U.S. ——, 49 U.S.L.W. 3343 (Nov. 10, 1980), dismissing app. from 83 N.J. 299, 416 A.2d 382 (1980) 15

Snowden v. *Hughes*, 321 U.S. 1 (1944) 14

Toomer v. *Whitsell*, 334 U.S. 385 (1948) 19

United States v. *South-Eastern Underwriters*, 322 U.S. 533 (1944) 21

CONSTITUTIONAL PROVISIONS

PAGE

U.S. Constitution

Article I, § 8 ..... *passim*

Article IV, § 2 ..... *passim*

FEDERAL STATUTES

15 U.S.C. §1011-15 21

STATE STATUTES

New York Banking Law

§ 266 ..... 2, 8

§ 268 ..... *passim*

§ 269 2

New York Insurance Law

§ 63 17

§ 651(6) 17

§ 653(1)(a) 17

§ 654 17

N.Y. Laws of 1938, C. 471 (Livingston-Piper Act).. 2

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-801

CONSUMERS UNION OF UNITED STATES, INC. and EDWARD J. GORIN,

Appellants,

against

MURIEL SIEBERT, Superintendent of Banks of the State of New York,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

The appellee moves under Rule 16(1)(c) and (d) of the Rules of the Supreme Court to dismiss this appeal from a unanimous judgment of a three-judge district court (A. 1a-22a†), convened in the Southern District of New York, or to affirm that judgment.

The judgment on appeal upholds New York Banking Law § 268 under the interstate Privileges and Immunities Clause of the federal constitution. The state statute limits the sale

† References preceded by the letter "A" refer to the appendix to the Jurisdictional Statement filed on this appeal.

of savings bank life insurance (or "SBLI") to residents and individuals working regularly in New York. Section 268, with Banking Law § 266, limiting SBLI policies to $30,000 per risk, and Banking Law § 269, requiring the sale of SBLI policies by salaried employees of savings banks, describe the class of individuals who may benefit from New York's SBLI program, the maximum benefit they may receive and the means by which the benefit is to be provided. Substantially identical limitations on the SBLI program were included in New York's original legislation (N.Y. Laws of 1938, c. 471 [Livingston-Piper Act]) as well as in the original legislation in Massachusetts and Connecticut, the only other states that offer SBLI. Opinion below, A. 8a-9a; Stipulation ¶¶ 20, 39.* These limitations remained in force in all three states when this case was last submitted to the three-judge court. Stipulation ¶ 39.**

The judgment was entered after this Court vacated the three-judge court's original judgment, *Consumers Union of the United States, Inc.* v. *Albright,* 427 F. Supp. 840 (S.D.N.Y. 1977), and remanded the case "for further consideration in light of *Hicklin* v. *Orbeck,* 437 U.S. 518

---

* The record in support of opinion and judgment below consists of a 50 paragraph stipulation of agreed facts, referenced on this motion as "Stipulation ¶ ," and a 297 page appendix of plaintiffs' and defendant's exhibits, referenced by exhibit designation, "Plfts. Exh. " or "Deft. Exh. ," and by appendix page, "Joint App. ."

** The only historic or current variation among the three limitations is confined to the amount of SBLI available per risk. The New York "policy ceiling" (now Banking Law § 266) was $3,000 per risk ($1,000 per single bank) when the program was enacted in 1938. It has been raised three times, in 1948, to $5,000 per risk (single bank limits also repealed), in 1958, to $10,000 per risk, and in 1967, to the current $30,000 policy ceiling. Stipulation ¶ 40. In 1979 (when the stipulation of agreed facts was executed), the Massachusetts policy ceiling was $53,000 per risk, and the Connecticut policy ceiling was $10,000 per risk. Stipulation ¶ 39.

(1978)," decided four days before the remand order. *Consumers Union of the United States, Inc.* v. *Heimann*, 437 U.S. 901 (1978). Dismissal of this appeal, or summary affirmance of the judgment on remand is sought now on the grounds that the decisions of this Court reviewed in affirmance of the judgment on remand is sought now on the opinion below foreclose consideration of the questions presented under the interstate Privileges and Immunities Clause or make it manifest that those questions do not warrant plenary consideration.

Statement of the Case

A. Savings Bank Life Insurance in New York

In 1907, Louis Dembitz Brandeis proposed that the legislatures of the several states enact savings bank life insurance programs to provide people of modest income with an alternative to "industrial" or "workingmen's" insurance. Opinion below, A. 6a; Stipulation ¶ 19.* Investigations of the life insurance industry substantially contemporaneous with the Brandeis proposal established that industrial life insurance was then sold at twice the cost of ordinary life insurance. Opinion below, A. 5a; Stipulation ¶¶ 15, 16. Approximately half of industrial policies lapsed within a year, and one-third did not survive three months. *Ibid.* An insured could not obtain equity in his policy until it had been in force for five years (*Ibid.*) and was not entitled to share in company profits or surplus at any time. Stipulation ¶ 22. The solicitation of new business, fed by agent commissions and high lapse rates,

---

* Industrial life insurance was attractive to people in this income because it was sold in small face amounts (generally not more than $1,000) for weekly or bi-weekly premiums (generally less than one dollar). Opinion below A. 4a; Stipulation ¶ 12. Medical examinations were not usually required, and premiums were collected at the insured's home by a company agent. *Ibid.*

was highly aggressive, and the profits of the two major commercial life insurers, Prudential Insurance Company of America and the Metropolitan Life Insurance Company depended on their industrial (rather than their ordinary) life business and, particularly, on their income from surrendered and lapsed industrial policies. Stipulation ¶¶ 12, 15, 16. On these findings, industrial life insurance was then fairly characterized as providing little or no protection at exhorbitant cost for those least able to pay for it but most in need. Stipulation ¶ 19; Deft. Exh. A, L.D. Brandeis, "Savings Bank Life Insurance for Wage Earners," 1907 Albany Law Journal 50, Joint App. 119.

Brandeis addressed these circumstances by proposing the creation of an alternative form of insurance, to be known as savings bank life insurance, which would attract the traditional purchasers of industrial insurance. *Ibid.* SBLI would be sound, reasonably priced insurance, issued in amounts that would provide the modest income group with the opportunity to obtain the economic security denied them under then prevailing industrial practices. *Ibid.* It would be created by legislative enactment and sold through state chartered savings banks. *Ibid.** Brandeis' initial proposal (Deft. Exh. A, Joint App. 119) and his lobbying efforts in several states (Deft. Exh. B, Joint App. 129) establish that he intended SBLI to be an optional state program. Each state legislature was to decide whether or not SBLI was an appropriate 'remedy', and adopt or reject the program as it saw fit. Concomitantly, any state legislature that adopted the program was to act within the purview of its own interests, i.e.,

---

* Brandeis selected savings banks to implement his proposed insurance program because of their record of success in meeting the banking needs of the economic group to which SBLI was directed, their not-for-profit structure and frugal management practices. In addition, the savings banks' pre-existing locations, goodwill and spill-over business would reduce the start-up and operating costs of the new SBLI program. Opinion below, A. 6a-7a; Stipulation ¶¶ 23, 24, Deft. Exh. A, Joint App. 122.

provide SBLI only for those individuals whose economic welfare was of legitimate concern to the enacting state. Thus, the Masschusetts SBLI program, adopted in 1907 (Stipulation ¶ 20), contained a state-relation, or 'geographic' requirement, of living or working regularly in the state, as did the original SBLI legislation in New York and Connecticut. Stipulation ¶¶ 20, 39. That Brandeis approved this requirement is established by the fact he included the state option component in his proposal,* that he urged New York to adopt the same legislation as Massachusetts (which included the state-relation requirement) (Deft. Exh. B, Joint App. 129), and that he did not oppose the requirement at any time between his initial proposal and his death in 1942 notwithstanding the intervening enactment of the Massachusetts, New York and Connecticut legislation. Compare Jurisdictional Statement, p. 17, suggesting that the state-relation requirement, Banking Law § 268 in New York, is inconsistent with Brandeis' 1907 proposal.

The New York legislature refused to adopt an SBLI program when it was first proposed in 1909. Stipulation ¶ 20. However, as early as 1906, the legislature responded to the investigatory findings that prompted the Brandeis proposal by enacting limitations on the expenses that commercial life insurance companies could incur. Stipulation ¶ 22. Particular emphasis was placed on expenses incurred in the acquisition of new business. Stipulation ¶ 22. Between 1938, when New York adopted an SBLI program, and 1941, the legislature acted specifically and extensively with respect to industrial insurance. Standard terms for industrial policies were required, including,

---

* State option is a nullity without a state-relation requirement since, absent the requirement, the enactment of SBLI in one state, creates a nationwide SBLI market. In such circumstances, the legislatures of the several states would be deprived of the choice of adopting or rejecting SBLI, a choice Brandeis plainly intended them to have. Deft. Exh. A, Joint App. 119 and discussion above.

the right to pay premiums at the insurer's office and save home collection expenses, rights to reinstatement, certain non-forfeiture benefits, cash values after a policy had been in force for a short period, and the right to have the company's divisible surplus ascertained and apportioned annually. Stipulation ¶ 22. Insurers were also prevented from making a charge against their agents' commissions for surrendered or lapsed policies, and licensure of industrial insurance agents was required as of 1940. *Ibid.* As a result of these legislative reforms, industrial insurance is more strictly regulated in New York than in any other state. Stipulation ¶ 17.

New York's SBLI program has a two fold purpose: to provide individuals of modest income with an alternative to industrial insurance, thereby enhancing their economic security in the manner that Brandeis believed would be most effective; and to minimize the risk to the state and local treasuries that would be required to pay public assistance to individuals who were willing to assume financial responsibility for themselves but were unable to do so because sound, reasonably priced insurance was not readily available to them. Opinion below, A. 20a-21a. In 1938, then Governor Herbert H. Lehman, urging the legislature to adopt SBLI, described it as a form of "social insurance," requiring "governmental" "initiative," whose purpose was to provide "a greater degree of economic security" for New York "wage earners" who were disadvantaged by the industrial life insurance policies then available. Deft. Exh. C1, Joint App. 143-44. The Governor also referred expressly to the second purpose of SBLI in New York (*Id.* at 144): "To the extent that our lowest paid workers purchase [SBLI], the public relief burden of the general taxpayer will be proportionately reduced." When SBLI was adopted, Governor Lehman described it as "a great social experiment which should be helpful to the lower income groups which now have to depend solely on industrial insurance." Deft. Exh. Cc, Joint App. 1466.

Under the New York legislation, savings banks that elect to participate in the SBLI program (now 68 issuing banks with 44 agent banks, Stipulation ¶ 26) have the "rights, powers [and] duties . . . [of] domestic legal reserve life insurance companies" only to the extent that such rights, powers and duties are applicable and not in conflict with provisions of the state's Banking Law." Opinion below, A. 7a; Stipulation ¶ 27. The three limitations that are incidents of all SBLI programs, i.e., the state-relation requirement (Banking Law § 268 in New York here in issue), policy ceilings and sales exclusively by salaried employees, are illustrative of the differences in the 'rights' of SBLI insurers and commercial, domestic legal reserve insurers. In addition, SBLI insurers in New York must operate through a savings bank life insurance fund ("the Fund") established in 1940. Stipulation ¶ 28. Although each issuing SBLI bank is separately chartered and retains its own profits, the Fund treats all SBLI banks as members of a unified system, requiring and providing standardized policies, medical assessments, and accounting and actuarial procedures, including distributing the mortality experience of each SBLI bank across all SBLI banks. Opinion below, A, 7a-8a; Stipulation ¶ 28. Commercial insurers have not 'right' to those procedures and thus do not obtain the automatic economies of scale and distribution of risks available to SBLI insurers. Compare jurisdictional Statement, pp. 3, 4-5, suggesting that SBLI and commercial insurers have the same rights and operate in the same manner.

New York SBLI is a success in terms of its legislative purposes. In 1974, it ranked 70th in amount of insurance in force among 1800 commercial and SBLI life insurers in the United States, and 6th in sales of individual policies among 114 life insurers doing business in New York. Opinion below, A. 9a; Stipulation ¶ 38. Since all of New York's SBLI sales are limited by the state-relation requirement (Banking Law § 268) and $30,000

policy ceiling (Banking Law § 266), it is apparent that SBLI is reaching large numbers of individuals in the modest income group whose economic security and potential dependence on the state were of express concern to Brandeis and Governor Lehman. In contrast to the growth of New York SBLI, industrial insurance business in New York has declined. In 1939, the lives of New York residents were insured by $3.5 billion in industrial policies. Stipulation ¶ 13. By 1976, the amount had dropped to $1.4 billion. *Ibid.* Whether this decline in industrial insurance is attributable to the competition generated by SBLI, as Brandeis contemplated, or to the reduced profitability of industrial policies after the legislature's extensive regulation between 1938 and 1941 (see discussion, pp. 5-6, *ante*), or to a combination of both factors, is unknown.

There are no substantial differences between the terms and conditions of the whole life and term policies now offered by New York SBLI and commercial insurers except for the $30,000 policy ceiling applicable to SBLI. Opinion below, A. 9a; Stipulation ¶¶ 44, 45. In addition, New York SBLI is sound, relatively low cost insurance. Opinion below A. 9a-10a; Stipulation ¶ 47. However, while it is a 'good buy' in life insurance, it is not the 'best buy.' Of the 98 life insurers licensed to do business in New York, including SBLI, SBLI and 24 others are rated "remarkably low" in cost by *Best Reports,* considered on authoritative source in the field. Opinion below, A. 10a; Stipulation ¶ 47. Of this group, 21 are agent insurers, and 4 are non-agent insurers. Stipulation ¶ 47. Of 619 commercial life insurers doing business nationwide, *Best Reports* has assigned 46 the same "remarkably low" cost rating, it assigned to New York SBLI. Opinion below, A. 10a; Stipulation ¶ 47. The lapse rate of SBLI policies is also favorable, but no different than at least 6 commercial insurers doing business in New York which, along with New

York SBLI, have received *Best Reports'* most favorable rating of "very low." Opinion below, A. 10a; Stipulation ¶ 48. Of this group, 2 are agent insurers, and 5 are non-agent insurers. Stipulation ¶ 48. Of 626 commercial life insurers doing business nationwide, *Best Reports* has assigned 19 the same "very low" lapse rating, it assigned to New York SBLI. Opinion below, A. 10a; Stipulation ¶ 48.

B. The Questions Properly before this Court and the Opinions Below

Appellants' question presented (Jurisdictional Statement, p. i) is erroneous in that it includes a former Commerce Clause claim against Banking Law § 268 which did not survive the Court's remand of the case on June 22, 1978, *sub nom. Consumers Union of the United States, Inc.* v. *Heimann,* 417 U.S. 518. The remand order states in terns that it is "for further consideration in light of *Hicklin* v. *Orbeck,* 437 U.S. 518 (1978)." 437 U.S., *supra,* at 518. The opinion of the three-judge court on remand correctly identifies *Hicklin* (as well as *Baldwin* v. *Montana Fish & Game Commission,* 436 U.S. 371 [1978] which it also considers) as cases brought under the interstate Privileges and Immunities Clause. It therefore reads this Court's instruction as limiting the remand to appellants' claim under that Clause, and does not discuss, or rule on, any other claim. Opinion below, A. 11a n. 13.* The Jurisdictional Statement now before the Court does not assign error to the three-judge district court with respect to its finding on the scope of the remand order or even suggest why that finding is wrong. It simply includes a Commerce Clause claim in the question presented without further procedural or substantitive discussion. See e.g. Jurisdictional Statement, Argument, wherein the Commerce Clause claim is not specifically addressed. The questions presented by appellee (p. i, *ante*) correct appel-

---

* The opinion on remand does recognize the mutually reenforcing relationship between the interstate Privileges and Immunities Clause and the Commerce Clause and discusses the leading cases decided under both Clauses. Opinion below, A. 11a n. 13, 14a-22a. See *Hicklin* v. *Orbeck,* 437 U.S., *supra,* at 531-34, citing and analyzing decisions under the Commerce Clause in support of interstate Privileges and Immunities Clause holding.

lants' error in this regard by eliminating all references to the Commerce Clause.*

Appellants' question presented is also erroneous in that assumes that an individual's interest in purchasing SBLI is 'fundamental' and thus within the protection of the interstate Privileges and Immunities Clause, and that Banking Law § 268 'discriminates' against that interest, thereby requiring appellee to show that the statute is supported by independent, non-discriminatory reasons and that the classification it establishes is narrowly drawn. Both issues were decided adversely to appellant below, and necessarily form the subject matter of this appeal. They cannot be presented as decided in appellants' favor at this point in time. The questions presented by appellee correct appellants' errors in this regard. Inquiry is directed first to the threshold question of whether an individual's interest in purchasing SBLI is protected by the interstate Privileges and Immunities Clause (Question 1). If so, inquiry is directed to the issues which must be decided to determine the constitutional validity of state imposed restrictions on such protected, fundamental interests (Question 2).

Several other errors appear in appellants' characterization of the prior opinions. The opinion below does not reaffirm the three-judge court's earlier holding that nonresidents do not have a 'fundamental' right to purchase SBLI under the interstate Privileges and Immunities Clause. Compare Jurisdictional Statement, p. 1. The earlier opinion accepted *arguendo* that a purchaser's interest in SBLI was sufficient to warrant the protection of the Clause. *Consumers Union of the United States Inc.* v.

---

* Appellants' Commerce Clause claim against Banking Law § 268 claim was separately briefed by both sides on the remand. It is separately treated at subpoints C and D of the argument section of this motion in the event that this Court finds that it is properly presented

Albright, 427 F. Supp. 840, 845-46 (S.D.N.Y. 1977). It then upheld Banking Law § 268 under the Clause, finding the reasons alleged in its support valid and substantial, *Ibid.* See also Jurisdictional Statement, p. 8, apparently conceding that the original district court opinion upheld § 268 under the Clause. In contrast, the opinion below (A. 11a-22a) provides a detailed analysis of the threshold issue, finding that the purchaser's interest in SBLI falls outside the Clause. It then finds, in addition, that § 268 is nondiscriminatory (A. 18a-19a) and consistent with the substantial state interest SBLI reflects (A. 21a n. 20, 22a).

Appellants' contention (Jurisdictional Statement, p. 8) that on remand "the district court never reached an analysis of *Hicklin* v. *Orbeck*, [*supra*], as ordered by this Court" is in startling contrast to the court's express acknowledgment of the terms of the remand (A. 3a), its statement that it was reconsidering the constitutionality of Banking Law § 268 "in light of the teachings of both *Hicklin* and *Baldwin*" A 11a), and its extended discussion of each case independently (A. 11a-12a [*Baldwin*], A. 12a [*Hicklin*]), in relation to each other (A. 13a-14a) and in relation to § 268 (A. 14a-17a). If applicants' contention is an attempt to assign error to the district court for considering *Baldwin* when the remand order referenced only *Hicklin*, and/or for considering the threshold issue of whether § 268 was subject to the interstate Privileges and Immunities Clause at all since *Hicklin* had disposed of that issue in favor protection under the Clause for the employment opportunities there in issue, it must be rejected. The district court specifically addressed its obligation to consider *Baldwin* as well *Hicklin*, citing appropriate authorities Opinion below, A.. 10a-11a. Appellants do not challenge the obvious good sense of the district court's view or the supporting authorities. Nor do they question the court's comment that both sides "assumed" that the remand would proceed in light of both *Hicklin* and *Bald-*

win. Equally, appellants offer no support for their construction of the remand order as foreclosing the district court from considering the threshold issue present in all privileges and immunities cases in this case. Indeed, the suggested construction remand orders would obviously result in numerous errors and conformed sound principles of judicial decision making. See e.g. *Reeves* v. *Stake,* —— U.S. ——, 100 S. Ct. 2271, 2275 n. 4 (1980), wherein this Court noted that its remand of the case under *Hughes* v. *Oklahoma,* 426 U.S. 794 (1976), had been inapposite and agreed with the Eighth Circuit's reliance on *Hughes* v. *Alexandria Scrap, Corp.,* 426 U.S. 794 (1976). Under appellants' strict construction of remand orders, the Eighth's reliance on *Alexandria Scrap,* as well as their previously decided cases, would have been foreclosed.

ARGUMENT

Prior Decisions Of This Court Foreclose Consideration Of Appellants' Claim Against New York Banking Law § 268 Under The Interstate Privileges And Immunities Clause Or Make It Manifest That The Claim Does Not Warrant Plenary Consideration.

A. An individual's interest in purchasing New York SBLI is not protected by the interstate Privileges and Immunities Clause.

Only interests and activities that are "basic" or "essential" to the "formation, the purpose, or the development of a single Union of . . . States" are within the interstate Privileges and Immunities Clause. *Baldwin* v. *Montana Fish & Game Commission,* 436 U.S. 371, 383 (1978). Differences in treatment without this "basic" dimension outside the Clause: they "merely reflect the fact that this is a Nation composed of individual States," each with its own laws and "are permitted." *Ibid.* Even if an interest or activity has a colorable "basic" dimension, it is excluded from the Clause if it derives solely from the relationship between residents, or citizens, and their state. *Snowden* v. *Hughes,* 321 U.S. 1, 6-7 (1944). As this Court stated in *Paul* v. *Virginia,* 8 Wall. 168, 180-81 (1968): "Special privileges [created by the citizen/state relationship] enjoyed by citizens in their own States are not secured in other States by [Article IV, § 2]. . . . It was not intended by this provision to give the laws of one State any operation in other States." This is true regardless of whether a state is viewed as acting in its sovereign capacity, as in its creation of a public assistance program, or in its proprietary capacity, as in its creation or involvement in commerce. See *Reeves* v. *Stake,* —— U.S. ——, 100 S. Ct. 2271, 2277-79 (1980).

Prior decisions of this Court, correctly reviewed in the opinion belov , do not permit interests akin to the purhase

of SBLI to be considered "basic" within the meaning of the interstate Privileges and Immunities Clause. Rather, they require that the state conduct of a program such as SBLI, and perforce the sale of policies under that program, be considered exempt from the Clause.*

As the district court observed, interests which are "basic" whether the meaning of the interstate Privileges and Immunities Clause are those which affect non-residents' rights " 'to ply their trade, practice their occupation, or pursue a common calling within the State.' " Opinion below, A. 12a, quoting *Hicklin* v. *Orbeck,* 437 U.S., *supra,* at 524. "The right of equal access to a particular type of life insurance simply is not comparable to such rights as to right to practice one's livelihood" with which the accepted standard, quoted above, has been identified. Opinion below, A. 14a. Appellants do not suggest why the purchase of SBLI is comparable to earning a livelihood.

---

* The only revelant decision not cited in the opinion below is *Rubin* v. *Glaser,* —— U.S. ——, 49 U.S.L.W. 3343 (Nov. 10, 1980), dismissing an appeal from a decision of the New Jersey Supreme Court reported at 83 N.J. 299, 416 A.2d 382 (1980). Therein, New Jersey's gave substantial real property tax rebates to residents who also maintained their principal places of abode within the state. The New Jersey Supreme Court held that the state's concern of alleviating the taxpayer's burden and assisting its residents in maintaining a home were sufficient to uphold the rebate program under the interstate Privileges and Immunities Clause. 416 A.2d, *supra,* 386-87. The Court's dismissal of the appeal in that case should foreclose further consideration of the questions presented herein. While both the New Jersey rebate plan and New York SBLI have a social welfare purpose, New York SBLI is specifically directed at the income group in need of aid whereas the New Jersey program provides a rebate for rich and poor homeowners alike. The New Jersey program discriminates against excluded residents and non-residents who pay higher taxes for the same or less services. New York SBLI does not discriminate against excluded non-residents. Any state can enact SBLI, and any excluded non-resident can buy life insurance on the commercial market with the same terms and conditions as SBLI for the same price. See discussion *ante,* pp. 4-5, 8-9.

They contend that there is a great deal of life insurance, both commercial and SBLI, in the market place (Jurisdictional Statement, p. 11), and that this Court (*per* the Chief Justice) has departed from the accepted standard, intending to assure non-residents the opportunity of purchasing "'goods and services on the same basis as citizens.'" Jurisdictional Statement, p. 10, quoting *Baldwin* v. *Montana Fish & Game Commission,* 436 U.S., *supra,* at 394 (BURGER, Ch. J., concurring). The first contention is obviously immaterial since the "basic" dimension of an interest or activity is assessed in terms of quality, not quantity. The second contention misreads the Chief Justice's concurrence. As reference to that opinion shows, the Chief Justice supported Montana's non-resident licensing restrictions on elk hunting and stated the accepted standard requiring a "basic" dimension for those "goods and services" protected by the interestate Privileges and Immunities Clause. Moreover, it is evident that the "goods and services" to which the Chief Justice referred were those in private trade or commerce, and not those which were the result of governmental welfare or proprietary programs. Any other reading of the Chief Justice's concurrence in *Baldwin* opposes his position with the majority in *Reeves* v. *Stake, supra,* supporting South Dakota's preference for residents in its proprietary cement enterprise.

Even if New York SBLI and the limitation on its policy sales established by Banking Law § 268 are viewed touching upon an interest with a "basic" dimension, they are exempt from the application of the clause. New York SBLI is the 'product' of the sovereign act of the state legislature, and necessarily the result of the political relationship between New York and its citizens, or residents. See *Paul* v. *Virginia, supra* and *Reeves* v. *Stake, supra.* That New York created SBLI is evident from the fact that it would not exist but for the state legislature's action in 1938. See Opinion below, A. 22a. Compare Jurisdictional

Statement, pp. 12-13, stating that New York merely 'authorized' the sale of SBLI as it authorizes the sale of commercial life insurance.*

New York SBLI is a social welfare program and entitled to the same deference from federally imposed constraints as any other state-created public benefit, or assistance, program. As the CBLI's history makes clear, it is intended to alleviate the financial distress of individuals whose recourse had been limited to industrial life insurance and to protect the state and local treasuries from their potential demands for public subsidies. See discussion, pp. 3-4, 6, *ante*. As the district court observed, SBLI is like New York's Workmen's Compensation Law, Old Age Law, and the Unemployment Insurance Law. Opinion below, A. 20a. Appellants' only contest on this point is that SBLI is not publicly funded. Jurisdictional Statement, p. 13. The district court responded appropriately (opinion below, A. 22a): "The fact that SBLI is able to provide blue-collar workers with a degree of economic security and reduce New York's relief burden without any cost to the State is a testament to the program rather than a reason for its unconstitutionality."

Indeed, once the legislature decided to create SBLI, it could have put the state into the business directly, *Osborn* v. *Ozlin*, 310 U.S. 53, 66 (1940). It could have required all banks (or other outlets) to sell it "by assigning the risk", e.g. New York Insurance Law § 63 (requiring all New York motor vehicle insurers to accept applications for liability insurance from those unable to obtain it elsewhere), Insurance Law §§ 651(6), 653(1)(a), 654 (requiring all New York fire insurers to accept applications for fire insurance

---

* Commercial life insurance is a matter of private contract and exists without regard to state authorization, albeit not without regard to state regulation in the public interest. Stipulation ¶ 11. To the extent SBLI is authorized by legislative act, it is created.

from those with insurable interests in property in the state who are unable to obtain it elsewhere). See *California Automobile Association* v. *Maloney,* 341 U.S. 105 (1951). Or, it could have offered the SBLI option to some banks (i.e. savings banks), as it did, with the prospect of increased business and increased "profits" as the incentive for their participation in the program. *Osborn* v. *Ozlin, supra.* The legislature's choice of the third approach obviously did not change the purpose or character of SBLI any more than the private contributions that support social security change the social insurance or public benefit character of that program. See Defendant's Memorandum, pp. 31-32.

While appellee does not believe that New York SBLI is properly considered as a state proprietary enterprise, this Court's recent decision in *Reeves* v. *Stake* should foreclose plenary consideration of Banking Law § 268 even if it is so considered. As the Court there held, 100 S.Ct., *supra,* at 2278-80, a state that enters the market place is entitled to the same freedom as the private entrepreneur. That freedom includes selecting its own customers. *Ibid.* A state need not to pay public funds to become a 'market participant,' *Reeves* v. *Stake,* 100 S.Ct., *supra,* at 2277; *Hughes* v. *Alexandria Scrap Corp.,* 426 U.S. 794 807-808 (1976), it need only create the enterprise.

B. Banking Law § 268 is reasonably related to substanntial state interests reflected by the savings bank life insurance program and does not discriminate against any excluded non-resident.

A state statute establishing classification between residents and non-residents with respect to an interest within the interstate Privileges and Immunities Clause must be upheld if "valid independent reasons" (other than the fact of non-residence) support the classification and "the degree of discrimination [affected by the classification] bears a close relation to them." *Toomer* v. *Whitsell,* 334 U.S. 385, 396 (1948). "[D]ue regard" is to be afforded the principle that States should have considerable leeway in analyzing local suits and in prescribing appropriate cures." *Toomer, supra.* This standard was recently reaffirmed in *Hicklin* v. *Orbeck,* 437 U.S., *supra,* at 525-26.

As the district court recognized, Banking Law § 268 satisfies the discrimination component of the standard with little difficulty since the statutes does not disadvantage any other state or any excluded non-resident. Opinion below, A. 18a-19a. New York's enactment of SBLI does not preclude any other state from enacting the same program. Thus, any excluded non-resident can obtain SBLI in the same manner and to the same extent that it has become available to the individuals included in § 268. Even if an excluded non-resident does not succeed in enacting SBLI in his own state, he suffers no disadvantage since insurance with the same terms and conditions is available from commercial life insurers at the same price. See discussion, pp. 8-9, 15 footnote.

Banking Law § 268 is also congruent with the concededly legitimate and substantial reasons which support New York's SBLI program. As noted, New York's interest in enacting SBLI was to relieve the financial distress of individuals with respect to whom it had an especial interest, both because they were within its legislative

jurisdiction and because of the demands they would make on the state and local treasuries if that distress were not alleviated. The district court recognized that these interests were perfectly consistent with § 268's limitation on policy sales to residents and persons working regularly in the state since those individuals had an economic relationship with, and potential dependence, on New York. Opinion below, A. 21a n. 20, 22a. Appellants' do not suggest any reason why New York's interest in its SBLI program should reach beyond the group of individuals now included by § 268, and none is apparent. The fact that SBLI is a good product (Jurisdictional Statement, pp. 2, 10, and discussion, pp. 7-9), albeit not the best product (discussion pp. 8-9) does not mean New York is required to, or should, impose it on other states. Indeed, appellants' position would create non-resident rights in New York SBLI which *Paul* v. *Virginia, supra* (quoted at p. 14), held were unwarranted and effectively preclude the several states from exercising their clearly intended option to adopt or reject the program. See discussion pp. 4-5.

C. Banking Law § 268 is not subject to scrutiny under the Comerce Clause

This Court's decisions prior to *United States* v. *South-Eastern Underwriters,* 322 U.S. 533 (1944), repeatedly excluded state regulation of insurance practices from scrutiny under the interstate commerce clause on the theory that insurance contracts were "not articles of commerce," "subjects of trade or barter," "commodities to be shipped from or forwarded from one State to another" or "interstate transactions, though the parties [to the insurance contract] may be domiciled in different states." *Paul* v. *Virginia,* 8 Wall., *supra,* at 183. The Court modified its position in *South-Eastern* and upheld the application of the Sherman Act to fire insurers doing business across state lines, citing the national scope and economic power of the commercial insurance industry to support its finding that the industry was engaged in interstate commerce. 322 U.S. at 539-43. *South-Eastern* was followed in 1945 by the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15. The Act was interpreted in *Prudential Insurance Co.* v. *Benjamin,* 328 U.S. 408 (1946) (upholding 3% premium tax on nonresident insurers when no similar tax was imposed on domestic insurers), as providing Congressional approval for present and future state systems regulating or taxing insurance even though those systems would have been within the Clause had Congress remained silent. 328 U.S. at 427-32. *Prudential* was recently cited in *Lewis* v. *BT Investment Managers, Inc.,* —— U.S. ——, 100 S. Ct. 2009, 2020 (1980), for the proposition that Congress can, through affirmative legislation as in the McCarran-Ferguson Act, confer upon the states "an ability to restrict the flow of interstate commerce that they would otherwise enjoy." In citing *Prudential* in this manner, the Court has plainly restored the pre-*South-Eastern* status quo with the result that SBLI is exempt from Commerce Clause scrutiny.

D. Banking Law § 268 does not violate the Commerce Clause

Reeves v. *Stake, supra,* disposes of any claim against Banking Law § 268 since the statute conforms with the theories of both the majority and dissenting opinions. Under the majority opinion, SBLI, is, at a minimum, a proprietary enterprise and free of restraint. 100 S. Ct., *supra,* at 2277-80. As discussed above (p. 19), nonresidents' access to SBLI, or policies sold on the same terms and conditions, is even less unique than nonresidents' access to South Dakota's cement or the materials needed to make it. See also Opinion below, A. 18a. This demonstration, as well as SBLI's specific and limited social welfare purpose, meets the threshold objection of the *Reeves* dissenters that the product not be withheld for the benefit, or financial advantage, of priviate citizens and businesses within the state. 100 S.Ct., *supra,* at 2283. The dissenters further concern that the natural flow of interstate commerce not be unduly burdened (100 S.Ct., *supra,* at 2285-86) is met by the fact that unlike South Dakota's participation in the cement business, New York did not participate in a pre-existing business or trade when it created SBLI. It created a new 'product,' new 'commerce' or new 'competition' which would not have existed but for its conduct and which was not, and is not now, part of the 'natural' flow of interstate commerce. Moreover, as the dissenters note, there would have been no objection to a South Dakota policy which would bar all nonresident access, enabling South Dakota to meet its own needs exclusively. 100 S.Ct., *supra,* at 2285. While New York SBLI has no disadvantageous effect, it is directed specifically and exclusively to New York's own needs, both those of its citizens and its public treasuries, and to no others. Nothing in the prior decisions of this Court requires a state to export its own product or to create competition in other states. Compare Jurisdictional Statement, pp. 2, 10.

CONCLUSION

Upon the foregoing, the judgment below should be affirmed, or this appeal dismissed.

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Appellee

JUDITH A. GORDON
Assistant Attorney General
of Counsel